

***United States Court of Appeals
for the
District of Columbia Circuit***



**TRANSCRIPT OF
RECORD**

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**BRIEF FOR THE NATIONAL LABOR
RELATIONS BOARD**

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United States Court of Appeals
For the
District of Columbia Circuit

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United States Court of Appeals

Joseph W. Stewart
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FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12887

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✓ DISTRICT 50, UNITED MINE WORKERS OF AMERICA,
PETITIONER

v.

✓ NATIONAL LABOR RELATIONS BOARD, RESPONDENT

No. 12950

✓ NATIONAL LABOR RELATIONS BOARD, PETITIONER

v.

✓ BOWMAN TRANSPORTATION, INC., RESPONDENT

ON PETITION TO REVIEW AND SET ASIDE PART OF AN ORDER OF
THE NATIONAL LABOR RELATIONS BOARD AND ON PETITION
TO ENFORCE SAID ORDER

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STATEMENT OF QUESTIONS PRESENTED

1. Whether substantial evidence on the record as a whole supports the findings of the Board that Bowman Transportation, Inc.—

(a) Violated Section 8 (a) (1) of the National Labor Relations Act, as amended, by interrogating its employees concerning their union activities, and by engaging in surveillance of its employees with respect to such activities;

(b) Violated Section 8 (a) (3) and (1) of the Act by discriminating against employees Welch Gross and Joe Lackey because of their union activities;

(c) Violated Section 8 (a) (2) and (1) of the Act by assisting or contributing support to District 50.

2. Whether the Order of the Board directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees, is a proper and lawful order.

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PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD, RESPONDENT

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BOWMAN TRANSPORTATION, INC., RESPONDENT

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JURISDICTION

Case No. 12887 is before the Court on petition of District 50, United Mine Workers of America, pursuant to Section 10 (f) of the National Labor Relations Act (61 Stat. 136, 29 U. S. C., Secs. 151 *et seq.*),¹ to review and set aside that portion of an order of the National Labor Relations Board (J. 1170-1173)² requiring Bowman Transportation, Inc., to cease giving effect to its contract with District 50, and to withdraw and withhold recognition from District 50 unless and until it is certified by the Board. This Court has jurisdiction of that proceeding by virtue of Section 10 (f), *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 74. Case No. 12950 is before the Court on the petition of the National Labor Relations Board for enforcement of its order against Bowman Transportation, Inc. The Court has jurisdiction of the enforcement proceeding under Section 10 (f) by virtue of District 50's petition to review. *International Ladies' Garment Workers' Union v. N. L. R. B.*, — App. D. C. —, 225 F. 2d 923.³ The two proceedings

¹ Relevant portions of the Act are set out in the Appendix to this brief, pp. 30 ff., *infra*.

² References designated "J." are to the numbers centered in bold face type on separate lines and printed in the upper corners of the joint appendix. References preceding a semicolon are to the Board's findings, and those following are to the supporting evidence.

³ The Company is a common carrier engaged in the transportation of freight by motor vehicle throughout the southeastern states (J. 1139; 930-931, 938). There is no dispute that the Company is engaged in commerce within the meaning of the Act.

were consolidated for purposes of a joint appendix and argument by Court order dated November 4, 1955. The Board's initial Decision and Order (J. 1138-1154, 1169-1173) is reported at 112 N. L. R. B. No. 55; its Supplemental Decision and Order (J. 1186-1191) is reported at 113 N. L. R. B. No. 83.

STATEMENT OF THE CASE

Briefly, the Board found that the Company interfered with, restrained, and coerced its employees in the exercise of their organizational rights, in violation of Section 8 (a) (1) of the Act; withdrew work assignment privileges previously enjoyed by Employee Lackey and discharged Employee Gross because of their membership in and activities on behalf of International Brotherhood of Teamsters, Chauffeurs, Warehousemen and Helpers of America, AFL, Local No. 612, in violation of Section 8 (a) (3) and (1); and assisted and supported District 50, United Mine Workers of America, in violation of Section 8 (a) (2) and (1). Where the testimony was in conflict, the Board adopted the credibility resolutions of the Trial Examiner. The evidence upon which these findings are based is summarized below.

I. The Board's findings and conclusions

A. Interference, restraint, and coercion

Early in November 1953, the Teamsters began an organizational campaign among the Company's employees (J. 1139; 125). About November 14, several of the Company's drivers held their first organiza-

tional meeting with the Teamsters' assistant business agent (J. 1139; 126, 143, 199, 524).

Early in the afternoon of November 21, Company Vice President Lockridge drove up to the home of Employee Jordan and told him, "You are going to have a little Union meeting this afternoon and you know where it is and I want you to tell me" (J. 1141; 501, 502-503). When Jordan refused to discuss the matter, Lockridge replied, "If you ain't going to tell me where the meeting is going to be held, I have got to find it and I have got to go" (J. 1141; 503).

That afternoon, about 20 employees held a second union meeting near a water tower in Burns Park, a somewhat isolated area three-quarters of a mile off a main highway and at the dead end of an unpaved road (J. 1140; 126-127, 203, 200-201, 281-283). Apart from the water tower, there are no buildings or structures of any kind in the immediate vicinity (J. 1140; 282-283). The park is located about one and one-half miles from the Company's place of business (J. 1140; 283). About half an hour after the conclusion of the meeting, but when eight to ten employees were still gathered at the site, Company President Bowman and Company Vice President Lockridge drove up to the park in a company car, greeted those present in a casual manner, and then departed (J. 1139-1140; 201-205, 235, 283-284, 329, 524-525, 664).

After the meeting, Employee Blackburn, who had been present at Burns Park when Bowman and Lockridge arrived, attempted to induce several of the Company's drivers on the highway to "come out with the Union" (J. 524-526). The following morning, Com-

pany President Bowman asked Blackburn if he "didn't feel pretty bad," remarked that he knew Blackburn "had been up practically all night making contacts with [Bowman's] drivers," and inquired "what was going on in that meeting behind that tank" (J. 1141; 527). Blackburn asked what Bowman had been "doing out there," and Bowman replied that he had been "just looking around" (*ibid.*).

That same morning Vice-President Lockridge again asked Employee Jordan "to tell him about that little Union [the employees] had stirred up around there" (J. 1141; 501). When Jordan disclaimed knowledge of the Union, Lockridge replied, according to Jordan's credited testimony, that if he "caught" Jordan and found out that Jordan was lying, Jordan was "going to be in trouble" (*ibid.*). Lockridge asserted that he had seen Jordan "talking to a bunch of them and he knew who the ring leaders was of them" (*ibid.*).

The Board found, in agreement with the Trial Examiner (J. 1141, 1146 n. 19, 1169 n. 1) that the Company violated Section 8 (a) (1) of the Act by engaging in surveillance over a union meeting and by interrogating its employees regarding their union activities.

B. Discrimination against union members

The morning following the second union meeting, while 15 or 20 drivers were gathered at the terminal, Bowman addressed several of the drivers whom he had seen in Burns Park the preceding afternoon (J. 1140, 1144-1145; 204, 283-284, 666). To Employee Lackey,

who had been one of the first employees to show interest in the Union (J. 199, 125-126), Bowman said, "Joe, you are the biggest liar of all. You promised me before when we had this labor trouble here that you'd never be mixed up in this Union no more" (J. 1140; 209, 497, 665). Bowman further told Lackey that "his vacation was over, he would turn his bills back in and take his trips like the rest" and then inquired whether he wanted to refuse "another run." Lackey replied that he did not (J. 1140; 498, 210, 665). For the past two years the Company "had made an effort" to assign Lackey to the Gadsden-Decatur run, which could be completed in a single day and, therefore, permitted Lackey to be at home with his sick wife at night (J. 1141-1142; 205-206, 218-231, 256, 745-746, 855-856, 970-998). However, that day the Company assigned Lackey to a trip from Gadsden to Georgia (J. 1141; 210).

Bowman then turned to the other employees who had been in Burns Park during his visit. He told Employee Welch Gross, who had been in the same car as Joe Lackey, "You are fired for tearing up my trailer" (J. 1140; 201-202, 210, 286-287, 666-667); see pp. 19-22, *infra*). He observed to Employee Moon, who had also attended the meeting at Burns Park, "You, of all guys, I can't see why that you would do me this way after what I've done for you. I loaned you money while you were sick in the hospital" (J. 1140; 127, 667, 211, 499). Bowman then told Moon that he would have to take another physical examination before he could return to work (J. 211, 499-500,

667-668). Bowman asked Employee White, who had attended the meeting with his wife and daughter, "who those women was [he] had with [him] on Saturday afternoon" (J. 666, 498-499). Bowman then observed to Employee Jordan, who had been acquainted with Vice President Lockridge for 30 years prior to Lockridge's attempt to learn from him the location of the union meeting, "take Brother Jordan, he is trying to play both ends and the middle * * * he's told around over here that he has got a friend in the office * * * as of now he doesn't have any" (J. 1140; 496, 824).

The Board found (J. 1169), in agreement with the Trial Examiner (J. 1142, 1146), that the Company discharged Employee Gross, and announced the revocation of Employee Lackey's work assignment privileges, because of their support of the Teamsters, in violation of Section 8 (a) (3) and (1) of the Act.

C. The strike called by the Teamsters

The day after the Company discharged Employee Gross for his activity on behalf of the Teamsters, Morton Sherman, the business representative of the Teamsters, attempted to get in touch with Company President Bowman in Gadsden by long distance telephone (J. 1140; 179). At intervals between about 8:30 and 10:30 that morning the long distance telephone operator reported that Bowman was not in and she would again attempt to reach him in 20 minutes (J. 1140; 180). Being unable to reach Bowman by long distance telephone, Sherman, together with his assistant, drove to Gadsden, registered at a hotel there,

and again made two or three telephone calls to the Company's office in an effort to reach Bowman (J. 1140; 181). At about 2:30 or 3:00 he reached the Company's chief dispatcher, whom he had known personally for 5 or 6 years (J. 181, 709). When Sherman identified himself and asked to speak to Bowman, the dispatcher stated that Bowman was out to lunch but was expected back soon (*ibid.*). Sherman left his name and hotel with the dispatcher and asked him to tell Bowman to return the call (J. 734). The dispatcher gave Bowman the message later that day, but so far as the record shows Bowman never attempted to return Sherman's call (J. 734-735).

Later that afternoon Sherman and his assistant came to Bowman's office in person and asked to speak to Bowman (J. 1140; 134, 146, 185). Bowman's bookkeeper replied that he was too busy to see them (*ibid.*). The Teamsters then established a picket line in front of the Company's Gadsden terminal (J. 1140; 134, 185-186). Bowman still failed to get in touch with the Teamsters (J. 191), and on the following day Sherman sent him a telegram requesting him to call Sherman at the hotel "in order that we might discuss labor disputes" (J. 593-594). The telegram was never delivered; the telegraph company informed Sherman that it had been refused (J. 187, 190, 593).

A considerable number of the Company's drivers went out on strike and joined the picketing (J. 1139; 134-137). The picketing continued until December 28, 1953, when a local state court issued a temporary restraining order prohibiting all picketing (J. 1139;

299, 904, 1046-1048). On May 17, 1954, the Court removed its ban on peaceful picketing, but made permanent that part of its decree which forbade picket line misconduct (J. 1139, 1147; 904, 1052-1054). Thereafter the Teamsters reestablished its picket line in front of the Company's Gadsden terminal (J. 1139, 1147; 786).

D. The Company's contract negotiations with District 50 and District 50's subsequent selection by the nonstriking employees

A few days before the injunction was modified, Employee Wilson, who was Company President Bowman's brother-in-law and who owned two of the tractor-trailers operated by the Company, informed Bowman that the employees would like to have a contract and that he had been in touch with District 50, United Mine Workers of America (J. 1147; 34-38, 84, 428-431, 467-469). Bowman agreed to call his drivers together and to poll them on whether they wished to be represented by District 50 (J. 1147; 434). In the meanwhile, on May 20 and 21, Bowman and his attorney met with representatives of District 50 at District 50's office in Birmingham and discussed at length the draft of a proposed contract (J. 1147; 39-41, 434-435, 775-779, 798-800). During these negotiations, as Bowman himself testified, the parties agreed "pretty much to the provisions of the contract" (J. 1147; 44). Wilson testified that at this time none of the employees had signed cards authorizing District 50 to represent them (J. 1148, n. 25; 444); the organizer for District 50 testified that his claim of majority representation was based on Wilson's assurances that he

had a number of signed authorization cards and that the employees would "all go" for District 50 (J. 791-792); and Bowman testified that he had not asked for any proof of District 50's majority, that he "thought they were honest men and took their word for it," and that he had discussed the contract with District 50 "on the assumption that they represented 51 percent of my employees" (J. 1147; 43-44).

Immediately after these conferences Bowman sent a teletype to the Company's various terminals directing all available employees to meet at the Company's headquarters in Gadsden on Saturday, May 22 (J. 1147; 46). The Company supplied gas for transportation of these drivers in the same manner that it bore its employees' travel expenses to a regular business meeting (J. 1147, n. 22, 1149; 414, 423). At about 9:00 in the morning of May 22, Employee Wilson came to the Gadsden terminal with a copy of the contract between District 50 and the Company (J. 1148-1149; 440). During the morning he showed the contract to the over-the-road drivers, who discussed its provisions until Bowman called the meeting to order in the afternoon (J. 1149; 440-442). Present at this meeting were the Company's secretary-treasurer and two of its terminal managers (J. 1147; 149, 418, 751, 64).

Bowman began the meeting by asking all those who wanted District 50 to represent them to signify by raising their hands (J. 1147; 49, 421-422, 443). Although none of them had signed cards on behalf of District 50, all those present raised their hands (J. 1147; 49, 443-444). He then asked for those opposed to District 50 to signify their opposition in the same man-

ner, but no one expressed any dissent (J. 1147; 49). After Bowman had polled the men a number of them questioned him about the contract which the Company and District 50 had agreed to (J. 1147; 48, 420-421, 478-480). During this discussion, most of the employees for the first time signed cards authorizing District 50 to represent them and authorizing a check-off of dues from their wages (J. 1148; 50-51, 418, 485, 999-1000). In response to a question from some of the men as to what they would have to do about paying dues, Bowman replied that "if they want to pay them today and have to pay them today—he would advance it to them from their next week's paycheck and give them the money" (J. 1148; 483-484). Shortly thereafter, Bowman withdrew from the meeting and about 63 signed cards were collected from those present (J. 1148; 480-482, 484, 592). The employees then voted on a slate of officers for a local organization of District 50 and Wilson was elected president (J. 1148; 481).

At about 2:30 that afternoon, during a recess in the meeting, Wilson turned over the 63 signed authorization cards to the representatives of District 50, the first they had received (J. 1148; 449-450, 764, 788-789, 801-802). One of District 50's representatives then telephoned Company President Bowman and asked for a meeting with the Company's employees (J. 1148; 110, 784). Bowman suggested that the meeting be held at the Company's terminal that afternoon (*ibid.*). Accordingly, District 50's representatives crossed the Teamsters' picket line at the terminal and discussed the objectives of District 50 with the Company's non-

striking employees (J. 1148, 1149; 785-787). Then District 50 met with Bowman and after a meeting which lasted an hour or two executed a collective bargaining agreement effective for 1 year and from year to year thereafter absent notice of termination (J. 1148; 56, 788, 950-969). The contract covered, among other things, wages,⁴ hours, seniority, pay periods, vacations,⁵ safety, disciplinary and grievance procedure, leaves of absence, employee liability for damages, furnishing of uniforms, payment for physical examinations, restrictions on transportation of passengers, strikes and lock-outs, and check-off of union dues (J. 1148; 950-969). Except for the grievance procedure provisions and two additional changes of a minor nature,⁶ the contract was precisely the same as that drafted before any of the employees had signed union cards (J. 1148; 781-782, 112-113, 117-118). Thereafter the Company checked off and remitted to District 50 the dues and initiation fees of those employees who had signed District 50 membership cards (J. 1148; 120-123, 484).

⁴ The rate per mile provided in the contract was greater than that paid by the Company before the Teamsters set up its picket line (J. 1148 n. 26; 435). The contract rate was less than that currently in effect, but Employee Wilson, District 50's president, testified that the higher rate paid during the strike "was known to everybody as a temporary pay rate" and that District 50 had decided that under the contract rate the employees "would be getting a quarter cent raise over the year before" (*ibid.*).

⁵ Under previous practice, an employee received a paid vacation only if he had been employed by the Company for 12 months prior to the beginning of the current calendar year (J. 1148; 479). Under the contract, he received a paid vacation after 12 months of service (J. 1148; 56, 946).

⁶ The recipient of the dues to be checked off by the Company was changed, and the word "Union" was substituted for the word "local Union" (J. 1148; 56, 780-782, 953, 954).

The Board found, in agreement with the Trial Examiner, that the Company rendered illegal assistance and support to District 50, in violation of Section 8 (a) (2) and (1) of the Act (J. 1149, 1170).

II. The Board's order

The Board's order (J. 1170-1173) requires the Company to cease and desist from the unfair labor practices found, or from in any other manner interfering with, restraining, or coercing its employees in the exercise of their statutory rights, and to cease and desist from giving effect to the contract with District 50. Affirmatively, the Company is required to offer reinstatement to Employee Gross, upon his request therefor, and make him whole for any loss of pay he may have suffered by reason of the discrimination against him;¹ to offer assignments to Employee Joe Lackey, upon his abandoning the strike current during the hearing and obtaining reemployment, without discrimination because of his union or concerted activities; to withdraw and withhold recognition from District 50 as its employees' exclusive bargaining representative unless and until it is certified as such by the Board; and to post appropriate notices.

STATEMENT OF POINTS

1. Substantial evidence on the record considered as a whole supports the Board's finding that the Company interfered with, restrained, and coerced its em-

¹ Back pay is to run from the time of his discharge until he joined the strike current at the time of the hearing, and from the date of his application to return to work until the date of the Company's offer of reinstatement (J. 1150).

ployees in the exercise of their statutory rights, in violation of Section 8 (a) (1) of the Act.

2. Substantial evidence on the record considered as a whole supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by withdrawing work assignment privileges from Employee Lackey, and discharging Employee Gross, because of their union membership and activity.

3. Substantial evidence on the record considered as a whole supports the Board's finding that the Company furnished illegal assistance and support to District 50, in violation of Section 8 (a) (2) and (1) of the Act.

4. The Board's order requiring, *inter alia*, that the Company withhold recognition from District 50 unless and until certified is the conventional appropriate remedy in cases of unlawful assistance, and is not rendered inappropriate by District 50's refusal to comply with the filing requirements of Section 9 (f), (g), and (h).

SUMMARY OF ARGUMENT

I. Interference, restraint, and coercion

The record fully supports the Board's finding that the Company violated Section 8 (a) (1) of the Act by spying on a union meeting and by interrogating its employees regarding it. The fact that, owing in part to an unlawfully interrogated employee's refusal to reveal the situs of the meeting to Company officials, they did not reach it until after the meeting had broken up does not detract from the Board's con-

clusion, since Company President Bowman knew the reason for the meeting, noted the identity of those still present, and subsequently visited reprisals on certain employees whom he had seen there.

II. Discrimination against Lackey and Gross

The record likewise supports the Board's finding that the Company withdrew work assignment privileges from Employee Lackey, and discharged Employee Gross, because of their union activity, in violation of Section 8 (a) (3) and (1) of the Act. Lackey and Gross were in the same car at the union meeting which Company President Bowman spied upon. The following day, in the course of an angry outburst against the employees' union activity, Bowman withdrew Lackey's work assignment privileges, avowedly for his union activity, and discharged Employee Gross, giving as his only reason an incident which to the Company's knowledge had occurred a month earlier. In the course of the litigation, the Company relied upon additional explanations for Gross' discharge, of which none was ever given to Gross himself, some were without support in the evidence, and one was never offered by Company President Bowman, who effected the discharge. In view of the chain of circumstances leading up to the discharge and the weakness of the explanations offered by the Company, the Board properly rejected the contention that Gross was discharged for cause.

III. Assistance to and support of District 50

The record as a whole supports the Board's finding that the Company furnished illegal assistance and support to District 50, in violation of Section 8 (a) (2) and (1) of the Act. Company President Bowman negotiated virtually a complete bargaining agreement with District 50, headed by his brother-in-law, before District 50 had any substantial representation among the Company's employees and without any reason to suppose that it had a majority. Bowman thereafter summoned the employees to travel to the terminal at Company expense, where his brother-in-law exhibited to the employees the contract which they might expect if they selected District 50 as their bargaining representative. Bowman then required the employees to disclose their opinion of District 50 in an open meeting in the presence of their supervisors. Thereafter Bowman permitted District 50 to use its terminal for the election of officers, invited District 50 to use the terminal for organizational purposes, and offered to advance money to the employees to pay their dues. Finally, the very day that a majority of the employees signed cards designating District 50 as their representative, the Company signed a complete bargaining agreement with District 50 almost identical to that inspected by the employees before they voted for District 50. Particularly in view of the rival Teamsters' inability even to talk to Bowman and the Company's previous discrimination against two employees for activity on behalf of Teamsters, the Company's assistance to and support of District 50 was

unlawful and in disregard of its duty to permit fair play between the two unions in their efforts to obtain the employees' favor.

IV. The Order

The Board properly ordered the Company to withdraw and withhold recognition from District 50 until it has been certified even though, so long as District 50 refuses to file the financial reports and non-Communist affidavits specified in Section 9 (f), (g), and (h) of the Act, District 50 cannot obtain certification. This type of order is ordinarily issued by the Board, with judicial approval, where, as here, the employer has illegally assisted and supported a labor organization. If the Board were to refrain from issuing such an order where the unlawfully assisted labor organization was not in compliance, it would in effect reward non-compliance and penalize compliance, in contravention of Congressional intent. The order does not infringe upon any right to recognition which the statute may confer upon District 50. District 50 has no right to recognition as long as the unfair labor practices which created and maintained its majority remain unremedied. If, when a free election can be held, District 50 continues its refusal to comply, this refusal and not the Board's order will disqualify it from obtaining certification. Moreover, the statute affords District 50 no remedy for breach of any statutory right to recognition which it may acquire without complying with Section 9 (f), (g) and (h), and after complying it would be in no worse

a position than any other assisted union which, under the Board order usually issued in cases of this kind, may not be recognized until it is certified.

ARGUMENT

I. Substantial evidence on the record considered as a whole supports the Board's finding that the Company interfered with, restrained, and coerced its employees in the exercise of their statutory rights, in violation of Section 8 (a) (1) of the Act

The evidence summarized on pp. 3-4, *supra*, amply supports the Board's finding that the Company, through its president and vice president, visited the isolated area where the second union meeting was held in order to find out who the Union "ring leaders" were (J. 501) and "what was going on in that meeting behind that tank" (J. 527). Particularly in view of the fact that the Company subsequently discriminated against two of the employees who attended this meeting (see pp. 4-6 *supra*), the Company's unlawful surveillance of its employees' union activities plainly violated Section 8 (a) (1) of the Act. *N. L. R. B. v. Pennsylvania Greyhound Lines*, 303 U. S. 261, 270; *E. Anthony & Sons v. N. L. R. B.*, 82 App. D. C. 249, 254, 163 F. 2d 22, 26, certiorari denied, 332 U. S. 773; *N. L. R. B. v. East Texas Steel Castings Co.*, 211 F. 2d 813, 816, 820 (C. A. 5).

Furthermore, in view of the unlawful conduct just referred to, the Company's interrogation of Employees Jordan and Blackburn regarding the union meeting likewise violated Section 8 (a) (1). *Joy Silk Mills, Inc. v. N. L. R. B.*, 87 App. D. C. 360, 368, 185 F. 2d 732, 740, certiorari denied, 341 U. S. 914.

The Company contended that its officials' visit to the site of the meeting was not unlawful on the ground that, owing in part to Vice President Lockridge's unsuccessful efforts to learn the location of the meeting from Employee Jordan (see p. 3, *supra*), they did not reach Burns Park until after the meeting had broken up. President Bowman's remarks to the employees on the following day (see pp. 4-6, *supra*) reveal that notwithstanding his tardiness he knew the reason for their gathering and noted the identity of those still present; and subsequently the Company visited reprisals on certain employees whom Bowman had seen there. The illegality inherent in the Company's surveillance cannot be cured by the fact that owing to the Company's difficulty in determining the site of the meeting, the inspection was less informative than the Company hoped.

II. Substantial evidence on the record as a whole supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by withdrawing work assignment privileges from Employee Lackey, and discharging Employee Gross, because of their union membership and activity

A. Lackey

The evidence summarized on pp. 3-5, establishes that the day after Employee Lackey attended a union meeting, Company President Bowman, who had spied upon the meeting, called Lackey a "liar," accused him of reneging on an earlier promise that he would "never be mixed up in this Union no more," and told him that his "vacation" was over and that thereafter he would have to take long runs like the other drivers

instead of being assigned to short runs to permit him to be at home with his sick wife. The evidence further shows that Bowman then inquired whether Lackey wished to refuse "another run" and that later that day the Company assigned Lackey to a long overnight run, the last he went on before joining the strike. This evidence amply supports the Board's finding that the Company violated Section 8 (a) (3) and (1) of the Act by announcing the withdrawal of Lackey's special assignment privileges because of his union membership and activities. See *Texarkana Bus Co. v. N. L. R. B.*, 119 F. 2d 480, 485 (C. A. 8) (Pierce and Whatley); *N. L. R. B. v. Southeastern Pipe Line Co.*, 210 F. 2d 643, 644-645 (C. A. 5).

B. Gross

After announcing that Lackey's work assignment privileges were being revoked because of his union activities, Bowman discharged Employee Gross, who had been present in the same car as Lackey when Bowman "visited" the union meeting. Immediately thereafter Bowman denounced Moon and Jordan for their union activities, and commented on White's presence at the meeting. Since the discharge of Gross thus occurred as part of Bowman's general denunciation of union activities, and inasmuch as the Company offered no other convincing basis for Gross' discharge, the Board could reasonably find, as it did, that the discharge was the result of his attending the union meeting the previous evening. See *E. Anthony & Sons v. N. L. R. B.*, 82 App. D. C. 249, 253-254, 163 F. 2d 22, 26-27, certiorari denied, 332 U. S. 773.

In considering the reasons for the discharge put forward by the Company, it should be noted that the Trial Examiner (who was affirmed by the Board) discredited Bowman's testimony as to the reasons for the discharge, relying in part upon Bowman's demeanor on the stand (J. 1142-1146). Even apart from this determination of credibility, the reasons which the Company offered for Gross' discharge do not "stand under scrutiny" (*N. L. R. B. v. Dant*, 207 F. 2d 165, 167 (C. A. 9)).

1. The Company contends that it discharged Gross in part because, when pulling his tractor over to one side of an underpass to avoid a car which was crowding him, he hit the top of his trailer against the underpass and damaged the trailer (J. 1142; 273-274, 845, 939). The Board's rejection of this contention was wholly reasonable, since the Company, although immediately advised of the accident, did not discharge Gross until the day after the union meeting, nearly a month after the accident (J. 1140; 272-273, 275, 284-286). See *Peoples Motor Express, Inc. v. N. L. R. B.*, 165 F. 2d 903, 905 (C. A. 4).

2. The Company further contends that it discharged Gross because he failed to make a report of the accident (J. 845, 939). The Board properly rejected this contention, since Gross made an immediate oral report to the chief dispatcher and the dock foreman, in complete conformity with company rules regarding accident reports, and was never asked to make a written report (J. 1142-1144; 274-276, 639, 646-650, 710-711, 815, 856-857).

3. The Company also insisted in its Answer to the Complaint that it discharged Gross because of his failure to abide by an agreement to pay for the damage resulting from the accident; this reason was not given by Bowman either when he discharged Gross or at the hearing (J. 1145; 287, 845, 939). The evidence shows that Gross repeatedly offered to pay for the damage; that shortly before the union meeting Bowman told Gross that this would be "all right" and instructed Gross to make arrangements with the dock foreman; and that Gross then arranged with the designated foreman for the Company to deduct a regular amount from each pay check until the repair bill was satisfied (J. 1143, 1146; 275, 277-279, 326). In view of the fact that Gross attended the union meeting that night and was discharged the following day, he received no pay checks from which the cost of the repairs could have been deducted pursuant to the agreement (J. 1139-1140; 281-282, 283-286).

4. Finally, the Company contends that it discharged Gross because his log book contained certain misstatements relating to the hours he drove. Since Gross was paid on a mileage basis (J. 1144; 435), the inaccuracies did not affect his compensation. In any event, the Board properly discredited this explanation of the discharge in view of the fact that the Company never relied thereon until it filed its Answer five months after Gross' discharge. This omission is particularly significant in view of the fact that the Company discharged Gross in the presence of a number of other drivers, the accuracy of whose log-keeping

would presumably have been promoted by knowledge that a fellow employee was being discharged for keeping improper logs.

In short, the only reason given Gross for his discharge was an accident known to the Company a month earlier, and of the three other reasons which the Company relied on during the litigation, two have no basis in fact and one was referred to only in the Company's Answer filed five months after the discharge. Furthermore, even assuming that any of these reasons had substance, the issue nevertheless remains whether the Company "acted upon [them], or for reasons prohibited by the Act." *Onan v. N. L. R. B.*, 139 F. 2d 728, 730 (C. A. 8). "The existence of some justifiable ground for discharge is no defense if it was not the moving cause." *N. L. R. B. v. Wells, Inc.*, 162 F. 2d 457, 460 (C. A. 9). Viewing the record as a whole, the Board could reasonably find "that there is more than a coincidental connection between [Gross'] attendance at the [union] meeting on one night and [his] discharge the following [morning],"^{*} particularly since the discharge occurred in the midst of an anti-union declaration, and the reason given at the time was an episode occurring several weeks before. These "circumstances reasonably indicate that the union activity weighed more heavily in the decision to fire him than did dissatisfaction with his performance." *N. L. R. B. v. Whitin Machine Works*, 204 F. 2d 883, 885 (C. A. 1).

^{*} *N. L. R. B. v. Condenser Corp.*, 128 F. 2d 67, 75 (C. A. 3).

III. Substantial evidence on the record considered as a whole supports the Board's finding that the Company furnished illegal assistance and support to District 50, in violation of Section 8 (a) (2) and (1) of the Act

The evidence summarized on pp. 8-11, *supra*, establishes that Company President Bowman negotiated virtually a complete bargaining agreement with District 50, headed by his brother-in-law, before District 50 had any substantial representation among the Company's employees, and without any evidence, other than District 50's naked claim, suggesting that District 50 had a majority. The evidence further shows that the Company thereafter summoned its employees to travel to its terminal at Company expense; that Bowman's brother-in-law there exhibited to the employees the contract which they might expect if they selected District 50 to represent them; and that Bowman thereafter required the employees to disclose their opinion of District 50 in an open meeting in the presence of their supervisors. Finally, the evidence shows that thereafter the Company permitted District 50 to use its terminal for the election of officers; that District 50 used the terminal for organizational purposes at Bowman's invitation; that Bowman offered to advance money to the employees to pay their dues; and that the very day that a majority of the employees signed cards designating District 50 as their representative, the Company signed a complete bargaining agreement with District 50 identical in most respects with that inspected by the employees before they voted for District 50, and requiring the Company to check off District 50 dues and initiation fees from the em-

ployees' wages. Under settled authority, the Company thus furnished unlawful assistance and support to District 50, in violation of Section 8 (a) (2) and (1) of the Act. See *S. H. Camp Co. v. N. L. R. B.*, 160 F. 2d 519, 523 (C. A. 6); *N. L. R. B. v. Idaho Refining Co.*, 143 F. 2d 246, 248 (C. A. 9); see also *International Association of Machinists v. N. L. R. B.*, 71 App. D. C. 175, 183-184, 189-190, 110 F. 2d 29, 37-38, 43-44, affirmed, 311 U. S. 72.

The Company apparently contends that it did not negotiate its contract with District 50 until after a majority of the employees had selected it as their collective bargaining representative. This contention is refuted by the uncontradicted evidence summarized on p. 11, *supra*, that the contract which, according to Bowman, the Company "technically" agreed to before any of the employees had signed union cards (J. 48) was virtually the same as that which it formally agreed to on the day that the employees first signed union cards and after only an hour or two of further negotiations. Indeed, it would have been almost impossible for the parties to negotiate any substantial part of such an elaborate agreement within the short interval between District 50's final acquisition of a majority and the formal execution of the contract.

Furthermore, at no time was District 50 the employees' free and untrammelled choice. Before the Company polled the employees, Company President Bowman's brother-in-law pointed out to the employees that, although the rival Teamsters then picketing the terminal had failed in their repeated efforts even to talk to Bowman (see pp. 6-7, *supra*), and although the

Company had visited reprisals on two employees for their Teamsters activity (see pp. 18-22, *supra*), the Company had "technically agreed to" (J. 48) and was fully prepared to execute a complete contract with District 50 covering the employees' conditions of employment for at least a year. The Company's "open and known hostility to [the Teamsters] and clear discrimination against it" together with "its tactics indicating a design to strengthen" District 50, constituted a plain disregard of "the neutrality and impartiality required by the Act." *Western Cartridge Co. v. N. L. R. B.*, 134 F. 2d 240, 244 (C. A. 7), certiorari denied, 320 U. S. 746. In addition to receiving the Company's graphic demonstration of the advantages the Company was prepared to give if they selected District 50 instead of the Teamsters, the employees were compelled to express their choice in "a public meeting—in which those voting for and against [were] disclosed to management and in which the influences of mass psychology [were] present"—conditions "not comparable to the privacy and independence of the voting booth" (*Brooks v. N. L. R. B.*, 348 U. S. 96, 99-100). The Company is in no position to rely on such constrained consent.

Finally, after conducting this poll, the Company furnished additional assistance and support to District 50 by offering to lend the employees money to pay initiation fees and dues to District 50 and by permitting District 50 to use company premises for a union meeting and for organizational purposes. Thus, "the maintenance as well as the acquisition of the alleged majority

was contaminated by the employer's aid." *International Association of Machinists v. N. L. R. B.*, 311 U. S. 72, 79.

IV. The Board's order is a proper exercise of its broad discretion in determining the appropriate remedy for unfair labor practices

As we have previously noted, in order to remedy the Company's unlawful assistance to and support of District 50 the Board ordered the Company to cease and desist from recognizing District 50 as its employees' collective bargaining representative, and from giving effect to its contract with that organization, and to withdraw and withhold recognition from District 50 unless and until it is certified by the Board (J. 1171-1172). This is the type of order usually issued by the Board where, as here, the employer has illegally assisted and supported, but not dominated, a labor organization with which it has a contract.⁹ Its purpose, as the Board pointed out (J. 1188), is "to enable the Board to assure the affected employees that their statutory rights to freely choose a bargaining representative shall be preserved by conducting an election under conditions which would render such a choice possible."

There can be no doubt, and District 50 does not dispute, that if the Board properly found that the

⁹ See, e. g., *Pacific Telephone and Telegraph Co.*, 76 N. L. R. B. 889, 890-893; *Fogel Refrigerator Co.*, 82 N. L. R. B. 1302, 1305-1307; *Douglas Canning Co.*, 85 N. L. R. B. 1004, 1004-1006; *Julius Resnick, Inc.*, 86 N. L. R. B. 38, 40-42; *Salant & Salant, Inc.*, 88 N. L. R. B. 816, 818-819, 822; *Pittsburgh Valve Co.*, 114 N. L. R. B. No. 50.

Company illegally assisted and supported District 50, the Board's order would ordinarily be entitled to judicial enforcement as a reasonable exercise of its broad discretion in devising remedies for unfair labor practices. The courts have uniformly held that such orders are reasonably calculated to remedy unfair labor practices like those committed by the Company here. *Elastic Stop Nut Corp. v. N. L. R. B.*, 142 F. 2d 371, 380 (C. A. 8); *N. L. R. B. v. Parker Bros.*, 209 F. 2d 278, 279, 280 (C. A. 4); *N. L. R. B. v. Braswell Motor Freight Lines*, 209 F. 2d 622, 624, 625 (C. A. 5); *N. L. R. B. v. Wemyss*, 212 F. 2d 465, 473-474 (C. A. 9). District 50 contends, however, that it is unable to obtain certification, because it has refused to file the financial statements and non-Communist affidavits specified in Section 9 (f), (g), and (h).¹⁰ Accordingly, District 50 argues that the Board has no power under the statute to impose upon District 50 the disability which the Board imposes upon other illegally assisted and supported unions which have complied with the filing requirements. The Board properly rejected this contention that failure to file the documents placed District 50 in a superior position to other unlawfully assisted unions.

In enacting Section 9 (f), (g), and (h), Congress intended to encourage unions to file the prescribed statements and affidavits, and to limit the effectiveness of those unions which refused to file them. *American*

¹⁰ These Sections (*infra*, pp. 31-33) provide in part that the Board shall not investigate a question concerning representation raised by a union which has not filed the documents prescribed by the Act.

Communications Association v. Douds, 339 U. S. 382, 389-390. If the statute imposed on the Board's remedial power the limitation urged by District 50, it would have the contrary effect, for it would in effect reward noncomplying unions and expose complying unions to a disability they could have avoided by non-compliance. It is unreasonable to suppose that Congress intended thus to encourage unions not to file financial statements and non-Communist affidavits, and to inhibit the Board's remedial powers where the beneficiary of unlawful assistance has not complied with Sections 9 (f), (g), and (h).

Contrary to District 50's contention, the Board's order does not infringe upon any right to recognition which the statute may confer upon it. District 50 has no right to recognition as long as the unfair labor practices which created and maintained its majority remain unremedied. When the effect of the Company's illegal assistance and support has been removed, District 50 is free, like any other union whose status has been similarly disturbed, to regain recognition by obtaining certification by the Board. If, when a free election can be held, District 50 continues its refusal to comply and thereby disqualifies itself from certification, its inability to regain recognition will flow, "not from the operation of the [Board's order], but from [District 50's] willful refusal to furnish information" under the requirements of Section 9 (f), (g), and (h) of the Act. *National Maritime Union v. Herzog*, 78 F. Supp. 146, 158 (D. D. C.), affirmed, 334 U. S. 854. Moreover, the statute affords District 50 no remedy for any refusal to bargain with it until it has

complied (*Inland Steel Co.*, 77 N. L. R. B. 1, 16, affirmed *sub nom. United Steelworkers of America v. N. L. R. B.*, 339 U. S. 382, 386, 415), and after complying, it would be in no worse position than the assisted unions in the cases cited on pp. 26-27, *supra*, which may not be recognized until they are certified.

CONCLUSION

For the reasons stated, it is respectfully submitted that District 50's petition to review should be denied, that the Board's petition for enforcement should be granted, and that a decree should issue enforcing the order in full.

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DECEMBER 1955.

APPENDIX

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 29 U. S. C., Secs. 151, *et seq.*), are as follows:

RIGHTS OF EMPLOYEES

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection, and shall also have the right to refrain from any or all of such activities except to the extent that such right may be affected by an agreement requiring membership in a labor organization as a condition of employment as authorized in section 8 (a) (3).

UNFAIR LABOR PRACTICES

SEC. 8. (a) It shall be unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7;

(2) to dominate or interfere with the formation or administration of any labor organization or contribute financial or other support to it: *Provided*, That subject to rules and regulations made and published by the Board pursuant to section 6, an employer shall not be prohibited from permitting employees to confer with him during working hours without loss of time or pay;

(3) by discrimination in regard to hire or tenure of employment or any term or condition

of employment to encourage or discourage membership in any labor organization:

REPRESENTATIVES AND ELECTIONS

SEC. 9. * * *

(f) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless such labor organization and any national or international labor organization of which such labor organization is an affiliate or constituent unit (A) shall have prior thereto filed with the Secretary of Labor copies of its constitution and bylaws and a report, in such form as the Secretary may prescribe, showing—

(1) the name of such labor organization and the address of its principal place of business;

(2) the names, titles, and compensation and allowances of its three principal officers and of any of its other officers or agents whose aggregate compensation and allowances for the preceding year exceeding \$5,000, and the amount of the compensation and allowances paid to each such officer or agent during such year;

(3) the manner in which the officers and agents referred to in clause (2) were elected, appointed, or otherwise selected;

(4) the initiation fee or fees which new members are required to pay on becoming members of such labor organization;

(5) the regular dues or fees which members are required to pay in order to remain members in good standing of such labor organization;

(6) a detailed statement of, or reference to provisions of its constitution and bylaws show-

ing the procedure followed with respect to, (a) qualification for or restrictions on membership, (b) election of officers and stewards, (c) calling of regular and special meetings, (d) levying of assessments, (e) imposition of fines, (f) authorization for bargaining demands, (g) ratification of contract terms, (h) authorization for strikes, (i) authorization for disbursement of union funds, (j) audit of union financial transactions, (k) participation in insurance or other benefit plans, and (l) expulsion of members and the grounds therefor;

and (B) can show that prior thereto it has—

(1) filed with the Secretary of Labor, in such form as the Secretary may prescribe, a report showing all of (a) its receipts of any kind and the sources of such receipts, (b) its total assets and liabilities as of the end of its last fiscal year, (c) the disbursements made by it during such fiscal year, including the purposes for which made; and

(2) furnished to all of the members of such labor organization copies of the financial report required by paragraph (1) hereof to be filed with the Secretary of Labor.

(g) It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied in the initial filing by subsection (f) (A) of this section, and to file with the Secretary of Labor and furnish to its members annually financial reports in the form and manner prescribed in subsection (f) (B). No labor organization shall be eligible for certification under this section as the representative of any employees, and no complaint shall issue under section 10 with respect to a charge filed by a labor organization unless it can show that it and any national or international labor organ-

ization of which it is an affiliate or constituent unit has complied with its obligation under this subsection.

(h) No investigation shall be made by the Board of any question affecting commerce concerning the representation of employees, raised by a labor organization under subsection (c) of this section, and no complaint shall be issued pursuant to a charge made by a labor organization under subsection (b) of section 10, unless there is on file with the Board an affidavit executed contemporaneously or within the preceding twelve-month period by each officer of such labor organization and the officers of any national or international labor organization of which it is an affiliate or constituent unit that he is not a member of the Communist Party or affiliated with such party, and that he does not believe in, and is not a member of or supports any organization that believes in or teaches, the overthrow of the United States Government by force or by any illegal or unconstitutional methods. The provisions of section 35 A of the Criminal Code shall be applicable in respect to such affidavits.

PREVENTION OF UNFAIR LABOR PRACTICES

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, law, or otherwise: * * *

(c) * * * If upon the preponderance of the testimony taken the Board shall be of the opinion that any person named in the complaint has engaged in or is engaging in any such unfair labor practice, then the Board shall state its findings of fact and shall issue and cause

to be served on such person an order requiring such person to cease and desist from such unfair labor practice, and to take such affirmative action including reinstatement of employees with or without back pay, as will effectuate the policies of this Act: * * *

(e) The Board shall have power to petition any circuit court of appeals of the United States (including the United States Court of Appeals for the District of Columbia), or if all the circuit courts of appeals to which application may be made are in vacation, any district court of the United States (including the District Court of the United States for the District of Columbia), within any circuit or district, respectively, wherein the unfair labor practice in question occurred or wherein such person resides or transacts business, for the enforcement of such order and for appropriate temporary relief or restraining order, and shall certify and file in the court a transcript of the entire record in the proceedings, including the pleadings and testimony upon which such order was entered and the findings and order of the Board. Upon such filing, the court shall cause notice thereof to be served upon such person, and thereupon shall have jurisdiction of the proceeding and of the question determined therein, and shall have power to grant such temporary relief or restraining order as it deems just and proper, and to make and enter upon the pleadings, testimony, and proceedings set forth in such transcript a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board. No objection that has not been urged before the Board, its member, agent, or agency, shall be considered by the court, unless the failure or neglect to urge such objection shall be excused because of extraordinary circumstances. The findings of the Board with

respect to questions of fact if supported by substantial evidence on the record considered as a whole shall be conclusive. * * *

(f) Any person aggrieved by a final order of the Board granting or denying in whole or in part the relief sought may obtain a review of such order in any circuit court of appeals of the United States in the circuit wherein the unfair labor practice in question was alleged to have been engaged in or wherein such person resides or transacts business, or in the United States Court of Appeals for the District of Columbia, by filing in such court a written petition praying that the order of the Board be modified or set aside. A copy of such petition shall be forthwith served upon the Board, and thereupon the aggrieved party shall file in the court a transcript of the entire record in the proceeding, certified by the Board, including the pleading and testimony upon which the order complained of was entered, and the findings and order of the Board. Upon such filing, the court shall proceed in the same manner as in the case of an application by the Board under subsection (e), and shall have the same exclusive jurisdiction to grant to the Board such temporary relief or restraining order as it deems just and proper, and in like manner to make and enter a decree enforcing, modifying, and enforcing as so modified, or setting aside in whole or in part the order of the Board; the findings of the Board with respect to questions of fact if supported by substantial evidence on the record considered as a whole shall in like manner be conclusive.

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**BRIEF FOR DISTRICT 50, UNITED MINE WORKERS
OF AMERICA**

*United States Court of Appeals
For the
District of Columbia Circuit*

FILED

JAN 19 1956

IN THE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

Edward T. Stewart
CLERK

No. 12,887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 12,950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

BOWMAN TRANSPORTATION, INC., *Respondent*

**On Petition to Review and Set Aside Part of an Order of the
National Labor Relations Board and on Petition to Enforce
Said Order**

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STATEMENT OF QUESTIONS PRESENTED

The questions stipulated by the parties are correctly stated by Petitioner named in No. 12950.

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IN THE
United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 12887

DISTRICT 50, UNITED MINE WORKERS OF AMERICA, *Petitioner*

v.

NATIONAL LABOR RELATIONS BOARD, *Respondent*

No. 12950

NATIONAL LABOR RELATIONS BOARD, *Petitioner*

v.

BOWMAN TRANSPORTATION, INC., *Respondent*

**On Petition to Review and Set Aside Part of an Order of the
National Labor Relations Board and on Petition to Enforce
Said Order**

**BRIEF FOR DISTRICT 50, UNITED MINE WORKERS
OF AMERICA**

COUNTER-STATEMENT OF THE CASE

We do not concede the facts as found by the Trial Examiner and the National Labor Relations Board to be true. Our position is that, taking the facts as found to be true, the Order relative to District 50 is not a lawful and proper order.

District 50, United Mine Workers of America, a union of national scope and a labor organization within the meaning of Section 2 (5) of the Labor Management Relations Act of 1947, as amended, has exercised its right of election and has elected not to file and has not filed with the Secretary of Labor, copies of its constitution and by-laws and the reports covered by the provisions of Section 9, paragraphs (f) and (g) of the Labor Management Relations Act of 1947, as amended, 61 Stat. 143, 29 U.S.C.A. Section 159 (f) and (g) and has not filed with the National Labor Relations Board, the affidavits specified in Section 9, paragraph (h) of the Act. (Petition for Review 2.)

District 50 was not a party in Cases No. 10-CA-1950 and No. 10-CA-1985 (Petition for Review 3) before the National Labor Relations Board begun by complaint filed June 30, 1954, with hearing August 3-5, 1954. It first entered the case on May 11, 1955, by Application to the Board (J. 1181-4)¹ to Modify the Order entered on April 22, 1955, by deleting and striking therefrom paragraphs 1 (c), 1 (d) and 2 (c) thereof (J. 1171) requiring Bowman Transportation, Inc., to cease giving effect to its contract with District 50 and to withdraw and withhold recognition from District 50 unless and until it is certified by the Board.

The Board denied the application in its Supplemental Order and Decision dated August 17, 1955 (J. 1191). After that denial, District 50, United Mine Workers of America, being aggrieved, filed with this Honorable Court its petition to review and set aside the aforesaid portions of the Order.

STATUTE INVOLVED

The relevant parts of the statute involved, not included in the Brief of Petitioner in 12,950, are: Sections 1, 2(4), 2(5) and 8(a)(3) of the Labor Management Relations Act:

¹ "J." refers to the numbers centered in bold face type on separate lines and printed in the upper corner of the Joint Appendix.

"It is declared to be the policy of the United States to eliminate the causes of certain substantial obstructions to the free flow of commerce and to mitigate and eliminate these obstructions when they have occurred by encouraging the practice and procedure of collective bargaining and by protecting the exercise by workers of full freedom of association, self-organization, and designation of representatives of their own choosing, for the purpose of negotiating the terms and conditions of their employment or other mutual aid or protections." 61 Stat. 136, 29 U.S.C., Section 151. (Last Paragraph)

"The term 'representatives' includes any individual or labor organization." 61 Stat. 137, 29 U.S.C., Section 152 (4).

"The term 'labor organization' means any organization of any kind, or any agency or employee representation committee or plan, in which employees participate and which exists for the purpose in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work." 61 Stat. 137, 29 U.S.C., Section 152 (5).

Section 158

"(a) It shall be an unfair labor practice for an employer—

(3) by discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: Provided, That nothing in this subchapter, or in any other statute of the United States, shall preclude an employer from making an agreement with a labor organization (not established, maintained, or assisted by any action defined in this subsection as an unfair labor practice) to require as a condition of employment membership therein on or after the thirtieth day following the beginning of such employment or the effective date of such agreement, whichever is the later, (i) if such labor organization is the representative of the employees as provided in section 159 (a) of this title, in the appropriate collec-

tive-bargaining unit covered by such agreement when made and has at the time the agreement was made or within the preceding twelve months received from the Board a notice of compliance with section 159 (f), (g), (h) of this title." 61 Stat. 140, 29 U.S.C., Section 158 (a) (3).

SUMMARY OF ARGUMENT

The Order of the Board as to District 50 Is Not a Lawful and Proper Order

A. This is a case of first impression.

Since District 50 was not a party to the cases at the time of the hearing before the Trial Examiner and at the time the Board made its original Decision and Order, it has no right to contest the facts as found by the Board, under question number 1 as stipulated by the parties. Therefore, since question number 2, as stipulated by the parties, relates to that part of the order "directing Bowman Transportation, Inc., to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees", is the part of the Order which adversely affects District 50, we limit our brief to question number 2, as stipulated by the parties; viz, Is that a proper and lawful order?

B. In order to answer that question, we look to the language of the Act: To the public policy declared, to the definitions stated, to the rights protected and denied, to the procedures denied and to the powers conferred on the National Labor Relations Board by the Labor Management Relations Act.

C. Filing and certification are not conditions precedent to representation. Majority designation, freely made, authorizes union representation. The right to designate implies the right to accept the appointment.

D. The order nullifies Section 7, adds a penalty for electing not to file the reports and affidavit specified in Section

9 (f), (g) and (h) which is not provided by the Act, imposes a barrier in perpetuity, and is, in effect, an administrative amendment to an Act of Congress.

E. The remedy does not fit the particular situation of the instant case. The Order does not effectuate; it contravenes the public policy of the Act.

ARGUMENT

The Order of the Board as to District 50 Is Not a Lawful and Proper Order

A. Question number 2 presents, we believe, a case of first impression. District 50 does not invoke the processes of the National Labor Relations Board prescribed by the Act. It does not attack the constitutionality of the Act. These facts distinguish the case of *National Maritime Union v. Herzog*, 78 F. Supp. 146. In that case, the union did invoke the processes of the Board. The second paragraph of the opinion concludes with these words: "Hearing of this, the plaintiff union intervened in the proceedings before the Board and sought the opportunity to be chosen as exclusive bargaining agent for the two bargaining units". The Board, we think, properly refused to put the name of the intervening union on the ballot and, therefore, could not certify that union under the provisions of the Act. The National Maritime Union asked the privilege of certification by the Board. District 50 asks that the Board be not allowed to require certification of it.

B. Since we know of no judicial precedents to afford a solution, we must consider most carefully the language of the Labor Management Relations Act of 1947, as amended.

First of all, we avow that we do not, in this litigation, make any attack whatsoever on the Act itself. While a man may honestly complain of some of the provisions of the Act, no man could sincerely contend that the Act is a hasty bit of legislation. Before passage, it was considered

in the House and Senate over a period of months. It is precision legislation. The Congress knew exactly what they wanted to do and carefully proceeded to do it.

When such an Act comes before a court for consideration, the limits set up therein are neither casual nor vague and shadowy. The rights recognized and protected are set forth in great detail.

C. The Act does not limit the right to represent employees for purposes of collective bargaining to those unions which elect to file the reports and affidavit specified in Section 9 (f) (g) and (h) nor to any specified type, character or kind of union. The term "representative" includes any individual or labor organization. "Labor organization" means any organization of any kind or any agency or employee representation committee or plan. The statute prescribes no disqualifications. The employees have all the world from which to choose their representative for the purpose of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

If the employees have a free and untrammelled choice of their representative, that power of choice cannot be nullified by limiting their selection to a particular kind or class or character of union. The right of free selection implies the right of free acceptance of the appointment.

To paraphrase the language of this Court in *Hill v. Florida*, 325 U.S. 538, at 542, we might say: The freedom of choice which Congress has expressly protected contemplates two parties to the selection; the party making the choice and the person, union or agency chosen, and this freedom cannot be thus frustrated by state legislation (and we might add, by Board Order).

The language of the Court in *Hill v. Florida*, supra, is as follows:

"* * * The declared purpose of the Wagner Act, as shown in its first section, is to encourage collective

bargaining, and to protect the 'full freedom' of workers in the selection of bargaining representatives of their own choice. * * * Congress attached no conditions whatsoever to their freedom of choice in this respect. Their own best judgment, not that of someone else, was to be their guide. 'Full freedom' to choose an agent means freedom to pass upon that agent's qualifications.

"* * * To the extent that Sec. 4 limits a union's choice of such an 'agent' or bargaining representative, it substitutes Florida's judgment for the workers' judgment." (Page 541)

In a case now pending in the Supreme Court of the United States, entitled *United Mine Workers of America, et al. Petitioners v. Arkansas Oak Flooring Co.*, bearing No. 227, Hon. Simon E. Sobeloff, Solicitor General, at the express request of the Supreme Court of the United States, filed a brief for the National Labor Relations Board as amicus curiae. In that brief, at page 14, we find this language:

"Similarly, the Board and courts of appeals have held that the rights guaranteed to employees in Section 7 of the Act—'to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in other concerted activities for the purpose of collective bargaining or other mutual aid or protection'—are not conditioned upon compliance with Section 9 (f) (g) and (h)."

The Solicitor General then proceeded to quote from *Leach d/b/a Brookville Glove Co.*, 114 NLRB No. 52 (October 6, 1955), 36 LRRM 1548 at 1549

"The Act does not proscribe bargaining with a non-complying union; indeed, consonant with public policy, an employer may voluntarily recognize and deal with such a union. If Congress had intended the Act to have the effect urged by Respondents, it easily could have inserted an express provision in the statute to

accomplish such result. This, Congress did not do. While the union in this case could not use the processes of this Board to obtain recognition as bargaining representative in view of its failure to comply with Section 9 (h) of the Act, we are not persuaded that Congress intended to withhold protection of the Act against discrimination from employees simply because they engaged in acts of self-help, otherwise legitimate, as members or adherents of a noncomplying labor organization. Hence we conclude that the strike in this case was a protected concerted activity. (Footnotes omitted.)”

The United States Court of Appeals for the Seventh Circuit in *National Labor Relations Board v. International Newspapers, Inc.*, 210 F. (2d) 501 (1954) said:

“* * * *The decisive question in any case is whether there has been an uninfluenced expression of majority will; it matters not how that will be expressed. Although the result of a secret election may well be the most convincing means of expression, the election medium is by no means exclusive. However expressed, an employer is bound by the employees' determination. In doing so, he should be free of charges of unfair labor practices absent substantial evidence indicative of bad faith.*” (Italics supplied)

The reasoning of the Board in the quoted *Leach* case, *supra*, applies with equal force to the instant case. We say, almost in the language of the Board, if Congress had intended to make certification a condition precedent to representation and to make compulsory the filing of the reports and affidavit specified in Section 9 (f) (g) and (h), it easily could have inserted express provisions in the statute to accomplish such result. This Congress did not do.

D. We have been unable to find a single phrase or clause in the Act which compels a union to file the reports and the affidavit specified in Section 9 (f) (g) and (h) except as to Section 9 (g) which applies to the annual reports

and affidavit of a union that has already filed. Both Sections 9 (f) and 9 (h) begin with the statement that no investigation shall be made and no complaint shall be issued. The difference arises in the next phrase. In 9 (f) the next phrase reads unless the labor organization shall have prior thereto filed the specified documents. In Section 9 (h), the next clause reads unless there is on file with the Board, an affidavit.

There is no language to place upon a union which has not filed an obligation to file. The only obligation stated is with reference to the annual reports.

Please note the language of Section 9 (g):

“It shall be the obligation of all labor organizations to file annually with the Secretary of Labor, in such form as the Secretary of Labor may prescribe, reports bringing up to date the information required to be supplied *in the initial filing by subsection (f) (A) of this section.*” (Italics supplied)

This language simply means that having elected to use the processes of the Board, the union may only continue that use by supplementing its initial filing with annual reports.

If Congress had intended to compel filing, it surely would have said so. The Board, by the indirect method of an administrative order, would do that which Congress carefully refrained from doing. By means of the instant order, all unions could be compelled to comply with the filing provisions of 9 (f) (g) and (h). An administrative order cannot be used to amend an Act of Congress.

In the case of *Colgate-Palmolive-Peet Co. v. N.L.R.B.*, 338 U.S. 355, we find this language:

“It is not necessary for us to justify the policy of Congress. It is enough that we find it in the statute. That policy cannot be defeated by the Board’s policy, which would make an unfair labor practice out of that

which is authorized by the Act. The Board cannot ignore the plain provisions of a valid contract made in accordance with the letter and the spirit of the statute and reform it to conform to the Board's idea of correct policy. *To sustain the Board's contention would be to permit the Board under the guise of administration to put limitations in the statute not placed there by Congress.*" (Italics supplied)

E. The Board order in the instant case does not fit the facts of the situation. In *Williams Motor Company v. N.L.R.B.*, 128 F. (2d), 960, the United States Court of Appeals for the 8th Circuit, used this language:

"In its choice of remedies to effectuate the policies of the Act, a wide range is necessary *because the remedy must fit the particular situation of each case.*" (Italics supplied)

In the same opinion, we find this language:

"The discretionary power of the Board is to select any remedy which reasonably is adapted to effectuate the policies of the Act and fitted to the particular situation being dealt with by it.

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"In determining whether a particular remedy is justified in a particular situation, there may be many considerations. Among these, two are pertinent here, which are somewhat counter-balancing. One is the 'restoration of the situation, as nearly as possible, to that which would have obtained but for the illegal discrimination'."

The brief of the Counsel for the Board contains this statement at page 28:

"District 50 has no right to recognition as long as the unfair labor practices which created and maintained its majority remain unremedied."

If, in fact, unfair labor practices created District 50's majority and still maintain it, we have no fault whatsoever

to find with the sentence just quoted. The next sentence reads:

“When the effect of the Company’s illegal assistance and support has been removed, District 50 is free, like any other union whose status has been similarly disturbed, to regain recognition by obtaining certification by the Board.”

Since Counsel for the Board knew that since the amendment of the Act, District 50 had elected not to file the reports and affidavit as specified in Section 9 (f) (g) and (h) of the Act and had consistently adhered to that election, the sentence last quoted seems to us to be facetious.

The quoted sentences clearly show that Counsel for the Board admit that the effect of the unfair labor practice may wear away. Their contention is that although the effect has worn away, the majority of the employees cannot exercise the right guaranteed to them by Section 7 until there has been a Board Election.

Counsel for the Board also, at pages 27 and 28, speak of District 50’s “wilful refusal to furnish information”. The Board in its Supplemental Order refers to “U.M.W.A.’s wilful refusal to comply with the provisions of Section 9 (f) (g) and (h)”. We submit the word “refusal” is not the proper word. “Refusal” connotes a command, direction, order or, at least, a requirement. Since the Act contains none of these, there was and is no wilful refusal.

There is a right of election. Experience had demonstrated to District 50 that the delays incident to Board procedures all too often injured and, in many cases, destroyed the local union completely. District 50 chose to exercise the economic pressures and rights of self-help to handle its problems in the recognized and lawful manner rather than to invoke the processes of the Board. It elected not to file.

In the Supplemental Order denying District 50's Petition for Review, the Board uses the following language:

"Pursuant to this Congressional mandate, the Board has, since its earliest days, recognized that the policies of the Act could best be effectuated in cases involving violations of Section 8 (a) (2) by directing the offending employers to withhold the preferred treatment afforded to the labor organizations involved until the effect of the unfair labor practices had been dissipated and the majority status of such unions had been established in an atmosphere free of restraint and coercion.

* * * * *

"However, in the case of an assisted but undominated labor organization, the Board has required the offending employer to withdraw and withhold recognition from the assisted union until it was certified, thus enabling the Board to assure the affected employees that their statutory right to freely choose a bargaining representative shall be preserved by conducting an election under conditions which will render such a choice possible." (J. 1188)

The position of the Board is that when the effect of the unfair labor practice has been dissipated, a Board election is the only method by which the majority of the employees can regain the rights conferred upon them by Section 7 of the Act.

The Board attempts to derive its power to issue the instant order from its practice with reference to dominated unions. There is a vast difference between a dominated union and a union which has been assisted. In a dominated union, the employees have not expressed their own choice but the choice of their master. It does not follow that the employees have not expressed their own choice in a situation where the employer supports and assists the union of their choice.

Contrary to the Board's belief, it does not seem to us to follow that the power of the Board to disestablish a domi-

nated union carriers with it as a corollary, the power to deny to employees the right to be represented by a union of national scope until that union has complied with Section 9 (f) (g) and (h).

Their reasoning amounts to this: Since we can disestablish a dominated union, we can issue our order to compel District 50 to comply with Section 9 (f) (g) and (h).

The ancient usage upon which the Board relies so heavily, developed under the Wagner Act. That Act did not deny the processes of the Board to any "labor organization".

Furthermore, the ordinary cease and desist order of that period was effective for a very short period of time:

"As a matter of practice, the Board permitted the union to petition for an election within 60 days of such determination." CCH Labor Law Reporter, 4th Ed., Vol. 2, p. 3965, par. 3595.

The public policy of the United States is declared to be: To protect the exercise by workers of full freedom of association, self-organization and *designation of representatives* of their own choosing. The Act does not limit employees to any specific method of designation. The public policy of Section 1 is followed by an express declaration of rights of employees in Section 7. It provides that, "employees shall have the right * * * to bargain collectively through representatives of their own choosing".

In continuing the use of the same order after the passage of the Labor Management Relations Act of 1947, as amended, the Board did not take into account the realities of the situation. Under the old Wagner Act, prior to the amendments, neither the employees nor the union selected by them were adversely affected. Under the new Act, such an order adversely affects the union. It amounts to a denial to the employees of the full freedom of choice of their

bargaining agent and denies to the chosen labor union the right to represent such employees.

It is a matter of common knowledge that the United Mine Workers of America and all its affiliated unions have exercised their right of election and have elected not to file the reports and affidavit specified in Section 9 (f) (g) and (h) of the Act. With that knowledge, hundreds of thousands of American working men have designated those unions as their representative for purposes of collective bargaining.

The penalty if District 50 does not file would be that it would be forever barred from acting as the designated representative of the majority of the employees even though it should be chosen by that majority, although nobody would contend that the effect of the support and assistance found by the Board was any longer to be felt.

Bans in perpetuity are not favored in our system of jurisprudence.

CONCLUSION

For the reasons stated, it is respectfully submitted that District 50's Petition to Review should be granted and that the Board's Petition for Enforcement of the Order "directing Bowman Transportation, Inc. to withhold recognition from District 50 unless and until that organization is certified by the Board as representative of Bowman's employees"; be denied and that a decree should issue deleting those paragraphs of the Board's Order relative to withholding recognition from District 50, and

that a decree should issue directing the Board to frame a proper and lawful order or, in the alternative, that this Court frame such an order.

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